

No. 20136

In the  
**United States Court of Appeals**  
For the Ninth Circuit

In the matter of STEWARD GRIFFITH, a married man  
acting in his separate capacity, bankrupt.

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**APPELLANTS' BRIEF**

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Appeal from the United States District Court  
for the Western District of Washington, Southern Division  
Honorable George H. Boldt, *Judge*

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NED HALL

1105 Broadway  
Vancouver, Washington

McCOLLOCH, DEZENDORF & SPEARS

HERBERT H. ANDERSON

STANLEY R. LOEB

800 Pacific Building  
Portland, Oregon 97204

*Attorneys for Appellants*

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## JURISDICTION

This is an appeal from three orders entered by the Referee in Bankruptcy and confirmed by the District Court.

Appellant Steward Griffith filed a petition in bankruptcy and was adjudicated bankrupt as a married man acting in his separate capacity in the United States District Court, Western District of Washington, Southern Division, on July 11, 1962.

On July 26, 1963 the Referee entered an order directing Steward Griffith, Merle Griffith, Columbia Acoustics, Inc., Gerald Davis, Rolland Henderson and Anne Buckner to turn over to the Trustee in Bankruptcy the sum of \$4,283.40 (R 51). On August 5, 1963 appellants filed their petition for review (R 43) and said order was confirmed by the District Court on March 18, 1965 (R 23).

On October 11, 1963 the Referee in Bankruptcy entered an order adjudging Columbia Acoustics, Inc. to be the alter ego of Steward Griffith Company and an asset of the bankrupt's estate (R 89). On October 21, 1963 appellants filed their petition for review (R 89) and said order was confirmed by the District Court on March 18, 1965 (R 80-A).

On November 29, 1963 the Referee in Bankruptcy entered *ex parte* an order staying Columbia Acoustics,

Inc. from the prosecution of an action for damages for conversion in the Superior Court of the State of Washington in and for the County of Clark entitled "Columbia Acoustics, Inc., a corporation, vs V. Frank Grover and Patricia Grover, husband and wife" (R 76). On December 9, 1963 the Referee entered an order (R 74) extending the time to file a petition for review until Dec. 13, 1963 and on Dec. 12, 1963 Columbia Acoustics Inc. filed its petition for review (R 72). Said order was confirmed by the District Court on March 18, 1965 (R 69).

The amount involved in each order is more than \$500. On April 13, 1965 Steward Griffith, Merle Griffith, Columbia Acoustics, Inc., Anne Buckner and Gerald Davis filed their notice of appeal to the United States Court of Appeals for the Ninth Circuit (R 16).

The District Court had jurisdiction under 11 USC §11(a)(10) as amended. This Court has jurisdiction under 11 USC §47 as amended.

### **STATEMENT OF THE CASE**

On July 10, 1962 Steward Griffith filed a petition in bankruptcy as a married man acting in his separate capacity.

#### **Order of July 26, 1963**

On April 3, 1963 the Trustee in Bankruptcy filed a



petition asserting that Gerald Davis, Rolland Henderson, Columbia Acoustics, Inc., Steward Griffith, Merle Griffith and Anne Buckner sold \$4,783.40 worth of vinyl belonging to the Trustee and collected the sales price hereof.<sup>1</sup> (R 61)

There was no allegation that any of the property was in possession of the bankrupt at the date of bankruptcy and there are no allegations to support summary jurisdiction. The petition states a claim for conversion, but not for the turnover of any property of the bankrupt.

On April 3, 1963 the Referee in Bankruptcy entered an order directing Steward Griffith and Merle Griffith, Columbia Acoustics, Inc., Rolland Henderson, Gerald Davis and Anne Buckner to show cause why they should not surrender possession of said sum of \$4,783.40. (R 59)

The marital community of Steward Griffith and Merle Griffith and Columbia Acoustics, Inc. filed answers asserting that they were adverse claimants and objected to summary jurisdiction (R 55, 57). Further objections to jurisdiction were made at the hearing on April 12 (pp 6, 7, Tr of April 12, 1963). Merle Griffith objected to the jurisdiction of the court for want of personal service (Tr of April 12, 1963, p 2).

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<sup>1</sup>The petition also asserted that Steward Griffith and Merle Griffith had accepted and cashed certain checks in violation of the court's order, but no evidence was offered in regard to such claim and it was abandoned by the Trustee.

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### **STATEMENT OF THE CASE**

On July 10, 1962 Steward Griffith filed a petition in bankruptcy as a married man acting in his separate capacity.

#### **Order of July 26, 1963**

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petition asserting that Gerald Davis, Rolland Henderson, Columbia Acoustics, Inc., Steward Griffith, Merle Griffith and Anne Buckner sold \$4,783.40 worth of vinyl belonging to the Trustee and collected the sales price thereof.<sup>1</sup> (R 61)

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1. The petition also asserted that Steward Griffith and Merle Griffith had accepted and cashed certain checks in violation of the court's order, but no evidence was offered in regard to such claim and it was abandoned by the Trustee.

At the hearing on April 12, 1963 Anne Buckner testified that Columbia Acoustics, Inc. had sold only \$459.90 worth of vinyls obtained from the bankrupt although it had sold other goods purchased from persons other than the bankrupt (Tr of April 12, 1963, p 30). Rolland Henderson testified that 25 to 35 per cent of the cost of vinyl board was attributable to vinyl (Tr of April 12, 1963, p 37) and that some vinyl materials had been obtained from the bankrupt and others had been purchased elsewhere (Tr of April 12, 1963, p 38).

On June 28, 1963 counsel for the Trustee erroneously represented to the court that Anne Buckner had testified that Columbia Acoustics, Inc. had sold \$4,783.40 worth of vinyl. (Tr of June 28, 1963, p 1) On page 4 of the transcript of June 28, 1963 counsel for the Trustee misrepresented that the witnesses, Anne Buckner and Rolland Henderson, had testified that they had collected money for the sale of said vinyl. In fact the sales were on credit (Tr of April 12, 1963, p 16).

The Trustee testified that she examined the books of Steward Griffith Company and over objection testified that the total amount of labor expended in manufacturing vinyl was in her opinion at the very most \$200 (Tr of June 28, 1963 pp 6, 7). For a reason which is unintelligible to us, counsel for the Trustee stipulated that the claims could be reduced by \$300 (Tr of June

28, 1963, p 9) together with a reduction of \$200 for said labor cost. The Referee therefore reduced the Trustee's claim by the sum of \$500, and on July 26, 1963 entered an order in which he found that "Columbia Acoustics, Inc., Stewart (sic) Griffith and Merle Griffith, Anne Buckner, Gerald Davis, and Rolland Henderson, one or all of them caused to be removed from the assets of the Estate of Stewart (sic) Griffith, Bankrupt, some vinyl and other merchandise and stock in the sum of \$4,283.40" and directed that said parties turn over to the Trustee the sum of \$4,283.40 "which they received from the sale of these assets of the Trustee." (R 52) Said order contained no finding that any property in possession of the bankrupt was involved and the court made no ruling on the objections to jurisdiction. There was no evidence whatsoever as to the value of any vinyl sold by Columbia Acoustics, Inc. or that any of the respondents, except Columbia Acoustics, Inc. which claimed the vinyl under a sale contract with the bankrupt made before bankruptcy, had received any part of said vinyl or the proceeds therefrom.

On August 5, 1963 Steward Griffith, Merle Griffith, Gerald Davis, Rolland Henderson, Anne Buckner and Columbia Acoustics, Inc. filed their petition for review of the Referee's order dated July 26, 1963. The petition for review was based on the lack of summary jurisdiction in regard to Columbia Acoustics, Inc., the absence

of personal jurisdiction over Gerald Davis, Rolland Henderson and Anne Buckner, the absence of evidence that Steward Griffith and Merle Griffith, Gerald Davis, Rolland Henderson, or Anne Buckner had at any time possession of said property or the proceeds thereof, the absence of evidence that said property had a value of \$4,283.40, the absence of evidence that any of said respondents, except Columbia Acoustics, Inc. ever had possession of the property, the failure of the Referee to permit Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith to present evidence, and the admission of opinions by Patricia Grover concerning the material contained in the records of Columbia Acoustics, Inc. (R 43-45).

On September 4, 1963 the Referee filed his Referee's Certificate on Review and Exhibits (R 24-26). On March 18, 1965 the District Court, without opinion, confirmed the Referee's order of July 26, 1963 (R 23).

#### **ORDER OF OCTOBER 11, 1963**

On July 26, 1963 the Trustee in Bankruptcy filed an application for an order to show cause why Columbia Acoustics, Inc. should not be declared the alter ego of the bankrupt and of Steward Griffith and Merle Griffith, a marital community (R 102). An order to show cause was issued by the Referee in Bankruptcy on July 29, 1963 which provided for service upon Steward Grif-

fith or Merle Griffith or Ned Hall, their attorney, or Columbia Acoustics, Inc., Rolland Henderson, Gerald Davis and Anne Buckner or Ned Hall, their attorney.

On August 9, 1963 Steward Griffith, Merle Griffith, Columbia Acoustics, Inc., Rolland Henderson, Gerald Davis and Anne Buckner filed their answer asserting that they objected (1) to summary jurisdiction, (2) to jurisdiction on the grounds that no appropriate service of process had been made, and (3) that the petition of the Trustee failed to state a claim upon which relief could be granted. It was affirmatively stated by appellants that Steward Griffith and Merle Griffith had abandoned to the Trustee any claim to amounts due from Columbia Acoustics, Inc. for property sold to it.

Testimony was taken on August 21, 1963 and October 8, 1963. At the outset of the hearing on August 21, 1963 Ned Hall, attorney for appellants, sought to learn what property was involved (Tr of August 21, 1963, p 1). At pages 10 to 13 of said transcript, counsel again inquired what property was involved and noted that the bankrupt had surrendered to the Trustee all of his interest in property sold to Columbia Acoustics, Inc. No claim was made by the Trustee to any property and it appeared that the Trustee already had all of the bankrupt's rights in the property of Columbia Acoustics, Inc. She had in fact seized and sold the property of Columbia

Acoustics, Inc. in December, 1962 (Tr of Oct. 8, 1963, pp 6, 7, 26, 27, 44).

The undisputed evidence was that Gerald Davis, Rolland Henderson, and Anne Buckner owned all of the stock of Columbia Acoustics, Inc., which they purchased with their own money. The evidence was also undisputed that Gerald Davis, Rolland Henderson and Anne Buckner were the only officers and directors of Columbia Acoustics, Inc. They had the right to terminate the employment of Steward Griffith at any time (Tr of August 21, 1963 p 66; Tr of Oct. 8, 1963, pp 2, 3, 25, 26).

The Referee found that Steward Griffith "dominated and managed and owned" Columbia Acoustics, Inc. (R 92), entered into a contract with Columbia Acoustics, Inc. to transfer his property thereto (R 91), and that said transfer left the bankrupt's estate with little or no assets (R 91). The undisputed evidence was that certain property was sold to Columbia Acoustics, Inc. by the bankrupt prior to bankruptcy for a consideration of \$50,000. In addition to the sale contract for that property (Exh 16 to Referee's Certificate on Review, R 81-83) which was surrendered to the Trustee, the bankrupt listed assets of the value of \$95,503.99 (R 15).



**ORDER OF NOVEMBER 29, 1963**

On November 29, 1963 the Trustee in Bankruptcy filed her petition with the Referee in Bankruptcy alleging that on April 11, 1963 Columbia Acoustics, Inc. had instituted an action in the Superior Court of the State of Washington in and for the County of Clark against V. Frank Grover and Patricia Grover (who is the Trustee in Bankruptcy) to recover damages for property which defendants had allegedly converted to their own use. The unsworn petition recited that Columbia Acoustics, Inc. had been declared to be the alter ego of Steward Griffith and that the Trustee was acting in accordance with an order entered by the Referee in Bankruptcy. On the same date, without a hearing or notice to any party, the Referee in Bankruptcy entered an order staying said suit.

**QUESTIONS PRESENTED****Order of July 26, 1963**

1. Was there evidence of the value of vinyl in the amount of \$4,283,40?
2. Was there evidence that any of appellants had in their possession on July 26, 1963 the proceeds from the sale of said vinyl?
3. (a) Was there allegation, evidence or finding of fact to support summary jurisdiction?

(b) Will a claim for conversion support summary jurisdiction without consent?

4. Was due process denied Gerald Davis and Anne Buckner by failure to serve them with process or notice?

5. Were Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith denied an opportunity to present evidence?

6. Do the findings fail to support a claim against all appellants because it states that "one or all" of appellants caused property to be converted?

7. Was there any evidence that any appellant received any proceeds from the sale of vinyl?

#### **Order of October 11, 1963**

8. Was there any allegation, proof or finding of fact or conclusion of law to support summary jurisdiction concerning the order of October 11, 1963?

9. Was there evidence to support a finding that the bankrupt transferred all assets to Columbia Acoustics, Inc. or that he dominated and owned said corporation and that it was his alter ego?

#### **Order of November 29, 1963**

10. Did the Referee have jurisdiction to stay an action *in personam* for damages for conversion by the Trustee and her husband?

11. Was due process denied where the injunction was entered *ex parte*?

### SPECIFICATIONS OF ERROR

1. The Court erred in confirming the order of July 26, 1963.

(a) The finding of conversion of vinyl of the value of \$4,283.40 was clearly erroneous.

There was no evidence to support the finding.

(b) The order to turn over the sum of \$4,283.40 was clearly erroneous.

There was no evidence that any of the appellants had the proceeds of the sale in their possession.

(c) There was no allegation, evidence or finding of fact to support summary jurisdiction and the court did not have summary jurisdiction to try this action for conversion.

(d) Gerald Davis and Anne Buckner were denied due process of law in that no service of process was ever made upon them.

(e) Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith were denied an opportunity to put on evidence.

(f) The findings do not support the order against

any appellant. The findings recite that "one or all" of appellants caused property to be converted.

(g) The order is clearly erroneous in requiring appellants to turn over the sum of \$4,283.40 "which they received from the sale of these assets", there being no evidence that any appellant received any sum from the sale of assets.

2. The court erred in confirming the order of October 11, 1963.

(a) The Referee did not have summary jurisdiction.

(b) The findings are clearly erroneous and do not support the order.

(1) There was no evidence to support a finding that the bankrupt transferred all assets to Columbia Acoustics, Inc. or that Steward Griffith dominated and owned Columbia Acoustics, Inc.

(2) There was no allegation, proof or finding of facts showing summary jurisdiction and the court did not have summary jurisdiction. No property in the actual or constructive possession of the bankrupt was involved since the bankrupt had sold the property to Columbia Acoustics, Inc. prior to bankruptcy and in any event at the time of the order the Trustee already had possession

of all of the property of Columbia Acoustics, Inc. and the interest of the bankrupt in the sale contract.

3. The court erred in confirming the order of November 29, 1963.

(a) The Referee has no jurisdiction to stay an action *in personam* for damages for conversion by the Trustee and her husband.

(b) Due process was denied where the injunction was entered *ex parte* without notice or hearing.

#### SUMMARY OF ARGUMENT

1. There was no evidence of the value of vinyl claimed by the Trustee or that any party received the proceeds from the sale of such vinyl.

2. There was no evidence that any party had possession of the property ordered to be turned over.

3. There was no allegation, evidence, finding or conclusion supporting summary jurisdiction and the court did not have summary jurisdiction to try an alleged claim for conversion.

4. Due process was denied Gerald Davis and Anne Buckner who were never served with any kind of pleading or process.

5. Columbia Acoustics, Inc., Steward Griffith and

Merle Griffith were denied an opportunity to put on evidence.

6. The findings do not support the order of July 26, 1963 because they recite that "one or all" of appellants converted property, but all were held liable.

7. There is no evidence to support the statement in the order that appellants received the sum of \$4,283.40 from the sale of vinyl.

8. The Referee did not have summary jurisdiction concerning the order of October 11, 1963.

9. The findings do not support the order of October 11, 1963 and are clearly erroneous. There is no finding of jurisdictional facts and the undisputed evidence was that the bankrupt owned no stock and was not an officer or director of the corporation. There is no evidence or finding that any property in the actual or constructive possession of the bankrupt, at the time of bankruptcy, was involved. The bankrupt had sold the property to Columbia Acoustics, Inc. before bankruptcy but in any event the Trustee had seized the property months before the order and the bankrupt had surrendered his interest in the sale contract, so there was no justiciable controversy presented.

10. The Referee did not have jurisdiction to enter an order staying an *in personam* suit for damages for

conversion and it was a denial of due process to enter the order without notice or hearing.

## ARGUMENT

### Order of July 26, 1963

1. There was no evidence of the value of vinyl claimed by the Trustee or that any party ever received the proceeds from the sale of said vinyl.

The court found that Columbia Acoustics, Inc., Steward Griffith and Merle Griffith, Anne Buckner, Gerald Davis and Rolland Henderson "one or all of them caused to be removed from the assets of the Estate of Stewart [sic] Griffith, Bankrupt," vinyl and merchandise worth \$4,283.40 and converted it to their own use (R 49). The finding is erroneous. There was no evidence that the vinyl had a value of \$4283.40 or that any respondent ever received any proceeds from the sale of such property.

The Trustee completely failed to produce any evidence of the value of said vinyl. Anne Buckner testified that the value of all the materials of Steward Griffith Company that Columbia Acoustics, Inc. used during the year 1962 was \$459.90 (Tr of April 12, 1963, pp 29-30). She gave no testimony of the value of vinyl purchased from Steward Griffith Company and sold by Columbia Acoustics, Inc. Rolland Henderson testified that the cost

of vinyl in retail sales contracts would be 25 to 35 per cent (Tr of April 12, 1963, p 37). There was no other relevant evidence.

At the commencement of the hearing of June 28, 1963 counsel for the Trustee erroneously represented that Anne Buckner had testified that Columbia Acoustics, Inc. had sold \$4,783.40 worth of vinyl and had collected the money. The fact is that she neither testified concerning \$4,783.40 worth of vinyl nor that there had been any collection of money from the sale of vinyl. Counsel's statements reported at page 1, Transcript of June 28, 1963, are wholly unsupported by evidence. At page 9, Transcript of June 28, 1963, counsel for the Trustee stated that there should be a deduction of \$200 for labor and \$300, the reason for which was not explained, and the court then immediately ruled that appellant should turn over to the Trustee the sum of \$4,283.40.

All of the evidence is contained in the transcript of April 12, 1963 and the transcript of June 28, 1963. Appellee is challenged to point to any evidence therein that any party received any proceeds from the sale of said property.<sup>2</sup> Appellants know of no evidence that purchasers from Columbia Acoustics, Inc. paid anyone for

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2. When a finding is challenged for lack of evidence, appellee is required under paragraph 3 of Rule 18 of this Court to provide record references to the evidence which supports the challenged finding.



said vinyl. The only evidence is that the sale was on credit (Tr of April 12, 1963, p 16).

Following the order of December 4, 1962 (R 63-65) the Trustee in Bankruptcy seized all the assets of Columbia Acoustics, Inc. and sold them in December, 1962 (Tr of Oct. 8, 1963, p 44). At the same time she claimed all of the accounts receivable and notified the account debtors of her claim by a notice typed at the bottom of the statements sent to the account debtors (Tr of Oct. 8, 1963, pp 45, 46). To permit this order to stand would be to allow the Trustee to have a double recovery by obtaining the accounts receivable for the sale of said vinyl and to have judgment against appellants who never received the proceeds of the sale.

2. There was no evidence that appellants had in their possession any property to turn over. An order to turn over property is appropriate only when there is evidence that the defendant has the property at the time of the proceeding. In *Maggio v. Zeitz*, 333 US 56, 92 L Ed 476 (1948), the court said concerning a turn over order:

“The nature and derivation of the remedy make clear that it is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendant at the time of the proceeding. \* \* \*”  
92 L Ed 484

3. The court did not have summary jurisdiction. The burden of alleging and proving summary jurisdiction is on the Trustee. *First National Bank of Negaunee v Fox*, 111 F2d 810, (CCA 6, 1940); *City of Long Beach v Metcalf*, 103 F2d 483, (CCA 9, 1939).

The Trustee's petition asserts no grounds for summary jurisdiction (R 61-62). She asserts that appellants sold property of the Trustee and "collected the money". If the petition asserts a claim, it is one for conversion, which cannot be tried by the Referee without consent. *Suhl v Bumb*, 348 F2d 869 (CCA 9, 1965)

Appellants objected to summary jurisdiction (R 55, 57). The Trustee produced no evidence to support summary jurisdiction and the Referee failed to make any finding or ruling on the objection to summary jurisdiction (R 48-49). In his Certificate on Review the Referee recites that the court had summary jurisdiction by reason of an order of December 4, 1962 (which appears in the record at pages 63 to 65). None of the parties other than the bankrupt were before the court at the hearing in connection with said order of December 4, 1962. But in any event said order contains nothing which supports summary jurisdiction. This property is in no way mentioned in that order.

Columbia Acoustics, Inc. asserted a bona fide adverse claim of right to said property by reason of having

purchased the property from the bankrupt on a conditional sale contract for \$50,000 prior to bankruptcy. Its answer asserts that it had possession and held its accounts receivable adversely to the Trustee (R 53). No attempt was made by the Trustee to show any facts to the contrary.

In this case the Trustee seeks a recovery for conversion. The property is said to have been sold and the proceeds therefrom applied to appellants' own use. This Court has recently held that tortious conversion of funds does not provide a basis for summary jurisdiction. In *Suhl v Bumb*, 348 F2d 869, (CCA 9, 1965), this Court said:

“\* \* \* In the absence of property of the debtor in the actual or constructive possession of the court, no basis for summary jurisdiction is provided. A tortious conversion of funds, as alleged here, can only be established in a plenary suit. A summary proceeding cannot establish the fact of the conversion and in that manner justify the treatment of the converter's assets as part of the bankrupt's estate, and, in turn, justify the court's administration of the converter's assets. To sustain such an approach would result in a sacrifice of one's right to a full dress trial to refute allegations of tortious behavior.” 348 F2d 874.

4. Gerald Davis and Anne Buckner were denied due process of law.

No process of any kind was served upon Gerald

Davis, Rolland Henderson or Anne Buckner. They made no appearance except that Rolland Henderson and Anne Buckner appeared as witnesses for the Trustee. The order to show cause provided that service could be made upon Rolland Henderson, Gerald Davis, Anne Buckner or Ned Hall, their attorney. A service was made upon Ned Hall but he was not the attorney for said individuals at that time. The service was insufficient and these parties were never brought before the court.

5. Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith were denied an opportunity to put on evidence.

Ned Hall represented Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith. At the conclusion of his cross-examination of the Trustee, the court inquired "Do you have anything further?" and Mr. Hall replied "I have nothing further", referring to the cross-examination (Tr of June 28, 1963, p 9). The court then announced its decision on the merits. At the hearing on July 26, 1963 Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith moved to reopen the hearing to put on evidence (Tr of July 26, 1963, pp 1-10). The motion was denied (Tr of July 26, 1963, p 10). Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith never had an opportunity to present evidence and were thereby denied due process of law.

6. The findings do not support the order of the Referee but in any event are clearly erroneous. The court found that "Columbia Acoustic, Inc., Stewart [sic] Griffith and Merle Griffith, Anne Buckner, Gerald Davis, and Rolland Henderson, one or all of them caused to be removed from the assets of the Estate of Stewart [sic] Griffith, Bankrupt, some vinyl and other merchandise and stock in the sum of \$4,283.40 and converted it to their own use" (R 49).

If *one of them* caused property to be converted, as the court found, the others would of course not be liable. But there was no evidence that any party had caused assets to be removed from the estate of the bankrupt. The evidence showed that Columbia Acoustics, Inc. bought the property prior to bankruptcy (Exh 16). It always agreed that it owed the bankrupt's estate for the purchase of said property. There was no claim and no evidence that the sale price was inadequate or that the sale was in any way other than a valid sale for a fair consideration completed prior to bankruptcy.

The order provided that Stewart Griffith, Merle Griffith, Columbia Acoustics, Inc., Gerald Davis, Rolland Henderson and Anne Buckner "turn over to the Trustee the sum of \$4,283.40 which they received from the sale of these assets of the Trustee." (R 49) The statement that they received that amount from the sale of the

assets is clearly erroneous. There is absolutely no evidence in support thereof.

There is no finding to support the Trustee's claim of summary jurisdiction. The court made no finding on the assertion of Columbia Acoustics, Inc. that it held the property under bona fide adverse claim of right. The trustee had the burden "of both alleging and proving facts supporting the jurisdiction." *First National Bank of Negaunee v. Fox*, 111 F2d 810, 813 (CCA 6, 1940) and the Referee's certificate was defective where "It did not contain any findings of the jurisdictional facts nor conclusions of law." *Kelso v. Maclaren*, 122 F2d 867, 869 (CCA 8, 1941).

### **The Order of October 11, 1963**

1. The Referee did not have summary jurisdiction.

There were no allegations in the Trustee's petition (R 102) showing any basis for summary jurisdiction. Objection was duly made by appellants to the court's summary jurisdiction (R 96). The evidence showed that prior to bankruptcy the bankrupt transferred certain property to Columbia Acoustics, Inc. by a conditional sale contract for a consideration of \$50,000 (Exh 16 to Referee's Certificate on Review, R 83). There was no finding of any property in the actual or constructive possession of the bankrupt at the time of bankruptcy, but on the contrary the court found that the bankrupt

had transferred property to Columbia Acoustics, Inc. prior to bankruptcy "by mortgages and contract" (R 91). The finding was that there had been a fraudulent transfer<sup>3</sup> although there had been no allegation and no evidence that the consideration of \$50,000 was less than a fair consideration. The fact was that all of the property of Columbia Acoustics, Inc. had been seized by the Trustee (Tr of Oct. 8, 1963, pp 6, 7, 26, 27) and admittedly sold by her in December, 1962 (Tr of Oct. 8, 1963, p 44). As a result there was no property involved which was in the actual or constructive possession of the bankrupt at the time of bankruptcy. There was simply no property at all involved in the proceeding. Summary jurisdiction does not permit declaratory judgments but in any event no justiciable controversy was presented.

The court made no findings on appellants' objection to summary jurisdiction (R 90-92) but attempted to correct the defect by asserting in the Certificate on Review that the court had summary jurisdiction "for the reason that all the assets of COLUMBIA ACOUSTICS, INC. are the property of this estate under order dated December 4, 1962" (R 82).

The order of December 4, 1962 (R 63) does not assert that the assets of Columbia Acoustics, Inc. are the prop-

3. The finding was: "That Steward Griffith found himself in financial difficulties and for the purpose of secreting his property and transferring his property to avoid his creditors, he entered into an alleged contract transferring all or substantially all of his property by mortgages and contract of his assets of the Steward Griffith Company to Columbia Acoustics, Inc., thereby leaving this bankrupt estate with little or no assets." (R 91)

erty of the bankrupt's estate. But no appellant other than the bankrupt was involved in the Bankruptcy Court on December 4, 1962 and if pertinent the order would not affect the other appellants. In any event the Trustee had already seized all of the property of Columbia Acoustics, Inc. (Tr of October 8, 1963 pp 6, 7, 26, 27, 44) and the proceeding could not have involved such property.

The Trustee had the burden of establishing summary jurisdiction (*First National Bank of Negaunee v. Fox*, 111 F2d 810 (CCA 6, 1940); *City of Long Beach v. Metcalf*, 103 F2d 483, 487 (CCA 9, 1939)) and failed to do so.

2. The findings are clearly erroneous; they do not support the order.

(a) The court found (R 91) that the bankrupt transferred substantially all of his property to Columbia Acoustics, Inc. thereby leaving his estate with little or no assets. The evidence does not support the finding. The fact is that the sale to Columbia Acoustics, Inc. was for a consideration of \$50,000 (Exh 16 to Referee's Certificate, R 83) and the bankrupt's interest in the contract was turned over to the Trustee (R 97). The bankrupt listed additional assets in his schedules of the value of \$95,503.99 (R 15).

(b) The court found that the corporation was



“dominated and managed and owned by Steward Griffith” (R 92). The finding is unsupported by evidence. The evidence was that the stock was owned by others and the court so found (R 91). Steward Griffith was not an officer or director; his services were terminable at any time by the officers and directors who were also the stockholders (Tr of Aug. 21, 1963 p. 66, Tr of Oct. 8, 1963, pp 2, 3, 25, 26).

(c) The court failed to make any finding of a jurisdictional fact which would support summary jurisdiction. The findings are thus insufficient to support the order.

(d) Columbia Acoustics, Inc. was not shown to be the alter ego of the bankrupt since the evidence was undisputed that Rolland Henderson, Gerald Davis and Anne Buckner purchased the stock of Columbia Acoustics, Inc. with their own funds, that they alone were the officers and directors and Steward Griffith was merely an employee whose services were terminable at any time (Tr of Aug. 21, 1963, p 66, Tr of Oct. 8, 1963, pp 2, 3, 25, 26). This was not a case of a transfer without consideration to a corporation owned by the bankrupt. The transfer was for a valid consideration, which has not been attacked, to an entity owned independently by others. The corporation used some items purchased from the bankrupt, but also purchased other

property—it did not operate merely with property acquired from the bankrupt (Tr of April 12, 1963, pp 30, 38). Previous to the hearing the Trustee had obtained possession of all the property of Columbia Acoustics, Inc. (Tr of Oct. 8, 1963, pp 6, 7, 26, 27, 44) and it was manifestly not operating as the alter ego of the bankrupt or at all.

### **The Order of November 29, 1963**

The court on November 29, 1963 (R 76) entered an order *ex parte* restraining Columbia Acoustics, Inc. from continuing an action begun April 11, 1963 by Columbia Acoustics, Inc. (R 78). The action was for an alleged conversion by V. Frank Grover and Patricia Grover, who is the Trustee herein.

1. Where *in rem* proceedings in non-bankruptcy courts interfere with the Bankruptcy Court's custody of the assets of the estate, they may be enjoined. 1 Collier on Bankruptcy (14th Ed) 304.

“\* \* \* On the other hand, *in personam* suits against bankruptcy receivers or trustees, as for conversion, do not interfere with the *res* in the bankruptcy court's possession and consequently cannot be enjoined. \* \* \* ” 1 Collier on Bankruptcy (14th Ed) 305

There is no showing here that the suit threatened any interference with the assets of the estate. The suit

was merely an action for damages for conversion. In *Hilding v. Guarantee Bond & Mortgage Co.*, 18 F2d 792 (W D Mich 1927), it was held that a federal court could not enjoin an action for conversion against a trustee in bankruptcy pending in a state court. The same result was reached, for the same reason, by the Seventh Circuit in a libel action against trustees of the debtor in a proceeding under Section 77 of the Bankruptcy Act. In *Re 4145 Broadway Hotel Co.*, 124 F2d 891 (CCA 7, 1941).

2. Appellant Columbia Acoustics, Inc. was denied any opportunity to be heard on said order which was entered *ex parte*. Due process was clearly denied.

### CONCLUSION

For the reasons stated, the orders of the District Court should be reversed.

Respectfully submitted

McCOLLOCH, DEZENDORF &

SPEARS

HERBERT H. ANDERSON

STANLEY R. LOEB

NED HALL

## APPENDIX A

## EXHIBITS

## A. ORDER OF JULY 26, 1963

<i>Exhibit No.</i>	<i>Identified</i>	<i>Offered</i>	<i>Received</i>
4	No	No	No

## B. ORDER OF OCTOBER 11, 1963\*

<i>Exhibit No.</i>	<i>Identified</i>	<i>Offered</i>	<i>Received</i>	<i>Refused</i>
1*	21	21	21	
2*	25	26	26	
3*	25	26	26	
4*	31	33	34	
5*	44	No	No	
6*	53		56	
7*	57	59		59
8*	78	82	84	
9*	88	89	90	
10*	90	92	92	
11*	106	107	109	
12*	110		112	
13**	33	33	33	
14**	35	36	36	
15**	39	39	40	
16**	68	69	69	

\* References are to pages of August 21, 1963 Transcript of testimony.

\*\* References are to pages of October 8, 1963 Transcript of testimony.

**CERTIFICATE**

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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*Attorney*

